Aboriginal Judicial Appointments to the Supreme Court of Canada

A Paper Prepared for the
Indigenous Bar Association by
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Introduction

Recent remarks by the newly appointed Minister of Justice affirming the possibility of the regular appointment of an Aboriginal person (an Indian, Inuit or Métis) to the Supreme Court of Canada mark something of a watershed in the evolution of Canada. The remarks are not without controversy. Fears of bias have been expressed in certain quarters, based on the proposition that an Aboriginal person cannot be impartial concerning Aboriginal rights. Of course, if that is true then so is the opposite statement, that descendents of settlers cannot be unbiased either. Arguments appealing to fear are not logically compelling, and given the fact that they apply equally to both Aboriginal and non Aboriginal people, point to the fact that the legitimacy of the Courts as institutions belonging to both settlers and Aboriginal people in Canada can only be enhanced by the participation of Aboriginal people in them. We propose then to move beyond *in terroram* argument and analyze the issue in a more principled way.

Another more serious objection raised against the appointment of an Aboriginal justice to the Supreme Court rhetorically asks "If an Aboriginal is to be appointed, then why not representatives of other minority groups?" This is a type of floodgates argument, which suggests that it is not possible for all minorities to be represented on the Court, and therefore no special recognition of Aboriginal people on the Court should be made. To this objection much of our argument will be directed. The thrust of our argument will be that the appointment of Aboriginal persons to the Supreme Court is philosophically consistent with Canadian Legal Pluralism, exemplified specifically by the constitutional entitlement of the people of Québec to their civil law system, as set out in the *Québec Act*,[1] and implicit in s. 94 of the *Constitution Act, 1867* which provided for the uniformity of laws in the three founding English speaking provinces in Confederation, but excluded Québec—implicitly because such uniformity in Québec would be impossible in light of the civil law which operated there. Simply put, the recognition and affirmation of

[1] *Québec Act (1774),* 14 George III, c. 83 (U.K.)

Aboriginal rights under s. 35 of the *Constitution Act, 1982*—rights based in part upon the laws and customs of the Aboriginal people—constitutionally recognizes those laws and customs in the same way that the Québec civil law is recognized.[2] That recognition carries with it a need to change the judicial institutions in this country to ensure they are, in form and substance, capable of administering those laws. If the changes wrought by the enactment of s. 35 of the *Constitution Act, 1982* underline a need to make space and become sensitive to indigenous legal traditions, this in turn points inexorably to the need for institutional change. Just as the recognition of the civil law of Québec makes it necessary that there be representation of Québec judges specifically on the Supreme Court, so too the recognition of Aboriginal laws and customs as living law in Canada makes Aboriginal representation necessary if the legitimate claim of the Supreme Court to be the final arbiter in cases concerning Aboriginal peoples is to be maintained.

So, we will proceed to examine the question by looking at the following topics:

1. Legal Pluralism Defined
2. Reconciliation and Legal Pluralism
3. Representation on the Supreme Court
4. Reconciliation and the Composition of the Supreme Court
5. Conclusion

Legal Pluralism Defined

Legal Pluralism as we use the term here reflects the capacity of Canada's domestic courts to embrace a plurality of legal traditions, in keeping with the country's constitutional history. Legal pluralism is a term of global significance reflected in many places around the world. We set out two definitions, from Europe and Australia:

> Pluralism means the simultaneous existence - within a single legal order - of different rules of law applying to identical situations. In other words, when different rules can solve one case in various ways, we speak about pluralism.

[2] *Constitution Act, 1982*, s. 35(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

> Pluralism can also be said when dealing with the co-existence of a plurality of different legal orders having links between them. Indeed, this is precisely what happens in the building of Europe.[3]
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> 'Legal pluralism' may be described as the situation resulting from the existence of distinct laws or legal systems within a particular country, especially where that situation results from the transfer of introduction of one of the systems as an aspect of an introduced political structure and culture.[4]

Legal Pluralism in Canada takes specific constitutional forms which differentiates it, as we shall see, from multiculturalism generally.

Reconciliation and Legal Pluralism

Legal Pluralism is similar but not identical to the principle of multiculturalism, or cultural pluralism, the difference being that while Canada has a long tradition of respecting the diverse heritages of the immigrant populations who have made this nation their own, three traditions, British, French, and Aboriginal, have woven their laws into the law of the land through a continuing historical reiteration and elaboration in the law of the land. The web of alliances between these three founding peoples formed a basis upon which other cultures could be accommodated. These three traditions have in Canada a specific constitutional and legal status apart from the general protection of minorities. For example, the preamble to the *Constitution Act, 1867* states that Canada has "a Constitution similar in Principle to that of the United Kingdom," and section 94 recognizes the existence of civil law in Québec. Cultural pluralism itself was specifically endorsed by the Court in *Reference re Secession of Québec*[5] and in that case the Court said this with respect to Aboriginal peoples as an illustration of the protection of minorities which the Court said was an underlying constitutional value in Canada:

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[3] André-Jean Arnaud, "Legal Pluralism and the Building of Europe" http://www.reds.msh-paris.fr/communication/textes/arnaud2.htm

[4] "The Recognition of Aboriginal Customary Laws, Volume I" *The Law Reform Commission Report No 1* (Canberra: Australian Government Publishing Service, 1986) http://www.austlii.edu.au/au/other/IndigLRes/1986/1/CUSTLAW1.rtf

[5] [1998] 2 S.C.R. 217 at paras. 79 to 82 (hereinafter *Secession Reference*).

> Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing Aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of Aboriginal peoples. The "promise" of s. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by Aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value. (Emphasis Added)[6]

However, Aboriginal peoples are not merely minorities in Canada. Like the British and the French, they have a long tradition of express recognition in the constitutional documents of Canada, including, among others, the Royal Proclamation of 1763, through to head 91 (24) of the *Constitution Act, 1867*, which achieved Confederation, and most recently in s. 35 of the *Constitution Act, 1982*. These documents express a continuing recognition and affirmation that Aboriginal peoples are the bedrock upon which the nation was built, that they have a special place in and relationship to Canada, (a relationship in which the honour of the Crown is at stake) and are not simply another minority group. What was said in the *Secession Reference* must be read in light of *R. v. Van der Peet*,[7] where the following was stated:

> In my view, the doctrine of Aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
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> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the Aboriginal rights

[6] *Ibid,* at para. 82.
[7] [1996] 2 S.C.R. 507 (hereinafter *Van der Peet*).

> recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.[8]

It is because Aboriginal peoples are unlike any other minority in Canada that reconciliation is required. Reconciliation under s. 35(1) arises from the beginnings of Canadian history that witnessed three distinct peoples intersect and come together to form the foundation of modern Canada in the aftermath of the Seven Years War, the American Revolution, and the War of 1812. These founding nations are the Aboriginal peoples of Canada, the French and the British respectively, and their relationship constituted Canada.

Despite the fact that Aboriginal peoples are the bedrock of present day Canada, despite the fact that Aboriginal peoples were historically military and political partners in the Seven Years War, the American Revolution, and the War of 1812,[9] and despite the fact that there have been repeated constitutional recognitions and affirmations of that fact, there has been only recently and incompletely the dim recognition of Aboriginal peoples as partners in Confederation. Aboriginal peoples did not take part in the debates surrounding Confederation. In fact, Aboriginal peoples were mentioned, to the best of our knowledge, only twice in the thousand pages of Confederation Debates which took place in the province of Canada in 1865—the two times being recitations of what is now head 91 (24) of the *Constitution Act, 1867*. Despite the recognized constitutional imperative for "uniformity of administration"[10] concerning aboriginal peoples, the policy set out in the Royal Proclamation was not extended throughout Canada. There was little recognition of Métis as Aboriginal people until 1982. Legally, Aboriginal peoples did not participate in many early judicial decisions which had great impact on their rights.[11] Courts refused to give effect to their treaty rights until the *Indian Act* was amended in 1951 to ensure those treaties had domestic effect by virtue of what is now s. 88, and doubts persisted as to whether or not treaties with Indians were in fact treaties at all until

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[8] *Ibid.* at paras. 30 and 31.
[9] Discussed below.
[10] *St. Catherine's Milling and Lumber Co. v. the Queen*, (1888) 14 App Cas. 46 (P.C.) at page 59 (Hereinafter *St. Catherine's Milling)*.
[11] Notably *St. Catherine's Milling*, *ibid.,* and others.

R. v. White and Bob,[12] *Simon v. the Queen*[13] and *R. v. Sioui*.[14] Again in 1951, the provision in the *Indian Act* which made it a crime to raise funds in order to advance Indian legal claims was repealed. Status Indians could not even vote in federal elections in Canada until 1960. The legacy of all this is that today, the presence of Aboriginal people as an integral part of contemporary Canada is not reflected in the institutions of this country, but their presence must be so reflected if Aboriginal peoples, and Canadian history, are to be treated fairly. The law of Canada already recognizes that Aboriginal peoples stand in a fiduciary relationship with the Crown.[15] This is fundamentally a recognition that the interests of Aboriginal peoples often are different from the majority in Canada in a way that the interests of no other group in Canada are, and that they are vulnerable because of this difference. If Canadian institutions are to be truly representative, they must represent Aboriginal peoples as well, so that they are equipped to find the public interest and the common good in a way that does not exclude Aboriginal peoples. This vision of legal pluralism forms an integral thread to the democratic compact and more pragmatically, it informs the manner in which Canadians perceive the historical underpinnings to the Constitution and the rule of law.

Moreover, this form of legal pluralism, distinct from multiculturalism, is consistent with the important consideration gained by indigenous peoples internationally. The recognition of indigenous peoples as a special and distinct subject area of international human rights law is rapidly developing as evidenced by the efforts of the United Nations Working Group on Indigenous Populations and U.N. Commission on Human Rights to perfect the Draft United Nations Declaration on the Rights of Indigenous Peoples.[16] The Draft Declaration contains a notable provision under Article VII with respect to the preservation of indigenous peoples' cultural integrity when it states:

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[12] (1965) 52 D.L.R. (2d) 481 (S.C.C.); affirming (1964) 50 D.L.R. (2d) 613(B.C.C.A).
[13] [1985] 2 S.C.R. 385. In *R. v. Syliboy*, [1929] 1 D.L.R. 307 (Co. Ct.), the Court had found at page 313 that "The savages' rights of sovereignty even of ownership were never recognized," which was specifically disapproved in *Simon*.
[14] [1990] 1 S.C.R. 1025.
[15] Guerin v. the Queen, [1984] 2 S.C.R. 335; R. v. Sparrow, [1990] 1 S.C.R. 1075; and others.
[16] See S. James Anaya and Robert A. Williams, Jr. "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System", 14 Harv. Hum. Rts. J. 33 (2001).

> 3. The states shall recognize and respect indigenous ways of life, customs, traditions, forms of social, economic and political organization, institutions, practices, beliefs and values, use of dress, and languages.[17]

Aboriginal peoples are not treated simply as cultural minorities but as peoples with a right to their own political organization and laws, which is consistent with the idea of legal pluralism.

Domestically, the particular form of legal pluralism appropriate to Aboriginal peoples is clearly demonstrated by the entrenchment of Aboriginal rights within the *Constitution Act, 1982* as prescribed under s. 35(1). It reads:

> The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

The particularity of Aboriginal peoples in Canada is reinforced by the s. 25 of the *Charter of Rights and Freedoms*:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including
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> *a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
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> *b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

While generally the protection of minorities which means their guaranteed equality with the rest of Canadians is the source of Canadian multiculturalism, it is clear that insofar as Aboriginal peoples are concerned that their protection is differently sourced.

[17] *See* Proposed American Declaration on the Rights of Indigenous Peoples, Art. VII, approved by the Inter-American Commission on Human Rights at its 133rd session on February 26, 1997, in OEA/Ser L/V/II.95.doc.7, rev. 1997.

The Canadian prescription of express constitutional recognition and affirmation of Aboriginal peoples and their rights stands in contrast to the constitutional status of Aboriginal peoples in the United States where they are mentioned under the U.S. Constitution twice in an offhand manner, and without the express recognition of Aboriginal rights.[18] The import of the American constitutional arrangements was initially to place Indians outside of the American polity, leaving them room to maintain self government, yet also to subject them—at times precariously—to congressional control. The Canadian Constitution, particularly since 1982, seeks greater Aboriginal participation, affords greater protections to Aboriginal people, and formalizes Aboriginal identity into Canada's democratic compact. The struggle in Canada to become a truly just society with a truly legitimate government, as envisaged by s. 35 of the *Constitution Act, 1982*, can ultimately only be achieved by Aboriginal participation in all institutions of government, so that those institutions become responsive instruments that reflect the Aboriginal presence in Canada. As stated by the Royal Commission on Aboriginal Peoples in a passage worthy of reiteration:

> Aboriginal peoples anticipate and desire a process for continuing the historical work of Confederation. Their goal is not to undo the Canadian federation; their goal is to complete it. It is well known that the Aboriginal peoples in whose ancient homelands Canada was created have not had an opportunity to participate in creating Canada's federal union; they seek now a just accommodation within it. The goal is the realization for everyone in Canada of the principles upon which the constitution and the treaties both rest, that is, a genuinely participatory and democratic society made up of peoples who have chosen freely to confederate.

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[18] *See* U.S. Const. art. I, 8, cl. 3, also known as the "Indian Commerce Clause" it provides that Congress "may regulate commerce … with the Indian Tribes." The lack of depth to this text has not escaped criticism on the part of scholars on indigenous law in the United States. *See also* Philip P. Frickey, "A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers", 109 Yale L.J. 1 (1999) at p. 70 where the author observes that, "In light of the narrowness of this text, it is something of a legalistic mystery how Congress ended up with "plenary power" over Indian affairs." *See also*, U.S. Const. Art. I. 2, cl. 3, that deals with the composition of the House of Representatives and reads in part "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. …" Interestingly, exemption of federal income taxes on individual Indians must be based on a treaty or act of Congress as the Internal Revenue Code does not specifically exempt individual Indians from payment of federal income tax. Having determined that Native Americans were citizens of the United States, individual exemptions no longer existed *ex ante* and accordingly, an express treaty right or Congressional Act is required to confer individual federal income tax exemption. See *Squire v. Capoeman*, 351 US 1 (1956). See also *United States v. Anderson*, 625 F2d 910, cert. denied. 450 US 920 (1980).

> Canada's image of itself and its image in the eyes of others will be enhanced by changes that properly acknowledge the indigenous North American foundations upon which this country has been built. Aboriginal people generally do not see themselves, their cultures, or their values reflected in Canada's public institutions. They are now considering the nature and scope of their own public institutions to provide the security for their individual and collective identities that Canada has failed to furnish.
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> This Commission concludes that a fundamental prerequisite of government policy making in relation to Aboriginal peoples is the participation of Aboriginal peoples themselves. Without their participation there can be no legitimacy and no justice. Strong arguments are made, and will continue to be made, by Aboriginal peoples to challenge the legitimacy of Canada's exercise of power over them. Aboriginal people are rapidly gaining greater political consciousness and asserting their rights not only to better living conditions but to greater autonomy.[19]

We note, however that the express constitutionalization of Aboriginal peoples' rights in Canada tends to diminish the willingness or ability of government to accommodate Aboriginal peoples despite the clear constitutional insistence that it must do so.[20] Paradoxically, American Indians have a much greater degree of self government because the Congress has the authority to take that self government away.

In order to address this gap between *de jure* recognition and affirmation of Aboriginal rights and *de facto* paralysis, we suggest that Aboriginal people must have representation on and participate in the legislative, executive, and judicial institutions of government in Canada. It is proper, therefore, that we place recent comments by the Minister of Justice, the Honorable Irwin Cotler, within the context of Canadian constitutional and legal pluralism, as it directly concerns Aboriginal identity, the capacity of Canadian institutions to perform the reconciliation of Aboriginal peoples with the Crown, as mandated by s. 35 of the *Constitution Act, 1982*, and the need to build dynamic and responsive systems of national governance within the constitutional framework of

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[19] From "Looking Forward, Looking Back", Vol I, *Report of the Royal Commission on Aboriginal Peoples, Volumes 1-6* (Ottawa: Supply and Services, 1996) "Opening the Door" http://www.ainc-inac.gc.ca/ch/rcap/sg/cg1_e.pdf

[20] See Binnie, W. I. C. "The *Sparrow* Doctrine: Beginning of the End of the Beginning." *Queen's Law Journal* 15 (1990): 217-53.

Canada. The Minister's remarks form the basis of our examination as we analyze and discuss important legal and public policy considerations that support the creation of an Aboriginal seat on the Supreme Court of Canada.

In the next parts of this paper, we will:

- examine the current appointments mechanism to the court and discuss the constitutional and policy considerations that justify the establishment and appointments system for Aboriginal justices to the court;
- review the principles of Canadian legal pluralism as endorsed by the Supreme Court of Canada; and
- Link-up Canadian legal pluralism with the on going process of reconciliation with respect to Aboriginal rights under s. 35(1).

Representation on the Supreme Court of Canada

We turn now to an examination of the current basis for regional, legal, and cultural representation on the Supreme Court of Canada. It will be demonstrated that the current appointment system has the capacity to accommodate Aboriginal representation pursuant to, and in conformity with, s. 35(1) of the *Constitution Act, 1982.*

The Supreme Court of Canada is constituted under s. 101 of the *Constitution Act, 1867,* as are the Federal and Tax Courts.[21] The Supreme Court of Canada has a broad and general jurisdiction, hearing appeals from across the country and covering all three legal traditions in Canada: Aboriginal law, civil law and the common law. While there has never been an Aboriginal justice appointed to the Supreme Court, modifying what is a well-established system of statute and convention to recognize the constitutional place of

[21] Section 101 of the *Constitution Act, 1867,* provides that Parliament may provide and establish a "General Court of Appeal for Canada" and any "additional Courts for the better Administration of the Laws of Canada". With regards to the statutes enacting the respective courts, see the *Supreme Court Act*, R.S.C. 1985, c. S-26, the *Federal Court Act*, R.S.C. 1985, c. F-7 and the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2.

Aboriginal peoples within Confederation would not be upset the legal order in Canada, but fulfill it.

With respect to the court's composition, section 6 of the *Supreme Court Act*, guarantees a minimum appointment of *at least* three judges from Québec.[22] The Court consists of one Chief Justice of Canada and eight puisne judges.[23] Section 6 reads:

> At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from among the advocates of that Province.[24]

In the past, two attempts have been made to enshrine this provision in the *Constitution.* The first occurred with the proposed *Meech Lake Accord* of 1987. The second occurred with the *Charlottetown Accord* of 1992. Custom and convention play important roles in providing regional representation from across the country with the composition of the puisne justice allowing for three justices from Ontario, one from Atlantic Canada, and two from the West. As well, since the appointment of Chief Justice Duff in the 1930's, with one exception,[25] the position of Chief Justice has been held alternately by a person from Québec and a person from the rest of Canada. The current practice, therefore, is one which is based, by statute and convention, on the recognition of Canadian legal pluralism as well as regional diversity in the appointment process. The appointment of an Aboriginal person to the bench of the Supreme Court of Canada would in our view not represent any departure from this principle, but rather its fulfillment. To reiterate what was said in the R.C.A.P. Report, quoted earlier, the goal of Aboriginal peoples in Canada "is not to undo the Canadian federation; their goal is to complete it."[26]

With respect to the criteria for an appointment to the Court, section 5 of the Act reads:

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[22] R.S.C. 1985, c. S-26 at s. 6.
[23] *Ibid.* s. 4.
[24] *Ibid.* s. 6.
[25] The one exception was the appointment of Chief Justice Dickson as successor to Chief Justice Laskin in 1984. Given the remarkable contribution of Chief Justice Dickson to the law in Canada, it is not so difficult to see his appointment as the exception which proves the rule.
[26] R.C.A.P., *supra*.

> Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

Apart from a minimum of legal experience, there are no other prerequisites for appointment. We are aware of the continuing controversy over the process of appointments to the Supreme Court. It is presently, apart from these minimum criteria, a matter which lies in the discretion of the Crown in right of Canada, acting through the Prime Minister and the Minister of Justice. Some would argue that in light of the power of the Supreme Court, especially since 1982, the matter should not be left to discretion. While we do not endorse a politicization of the appointment of judges, we would suggest that the creation of an advisory body to select a pool of possible appointments from which the final choice would be made, is appropriate. We would however, suggest that one of the members on such a committee should be drawn from the Indigenous Bar Association as the recognized association of indigenous lawyers in Canada. And, of course, any consideration of formalizing the appointment processes in any manner should specifically invite the participation of Aboriginal people, and the I.B.A.

With respect to the interpretation of section 5 of the Act, we note that no mention is made of provincial court judges, perhaps because when the Act was drafted, the provincial courts consisted primarily of magistrates who did not necessarily have legal training. That is no longer the case. If the effect of this section is to exclude provincial court judges, we note that many of the present Aboriginal judges in Canada sit in provincial courts, which is attractive to them because it, primarily, is the court with which Aboriginal people have to deal. We would suggest that section 5 be amended to make it clear that provincial court judges are not excluded from appointment to the Supreme Court.

We also note in passing that section 30 of the Supreme Court Act also provides for the appointment of *ad hoc* judges "Where at any time there is not a quorum of the judges

available to hold or continue any session of the Court, owing to a vacancy or vacancies, or to the absence through illness or on leave or in the discharge of other duties assigned by statute or order in council, or to the disqualification of a judge or judges…". While the section would need to be altered to have application in Aboriginal cases, it could be modified to allow the *ad hoc* appointment of Aboriginal judges to ensure a fair and just reconciliation of those cases. As stated by Lamer C.J:

> the only fair and just reconciliation is, as Walters suggests, one which takes into account the Aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.[27]

We suggest that if Aboriginal rights are "both procedural and substantive",[28] the Supreme Court should be composed in such a way that in those cases as to ensure that formally the Aboriginal perspective is taken into account, and the possibility of *ad hoc* appointments as well as the creation of an Aboriginal seat on the court could be used to that end.

Central to any Aboriginal justice appointment measures is a recognition that the country is comprised of distinct regions that collectively play a vital role in maintaining the democratic compact—that it is not simply enough to have equality before the law, but that the regions must be extended an equal opportunity to be represented in the exercise of its authority, its enforcement, and in defining its scope and content particularly when the issue concerns the application of laws particular to their own identity and system of governance. In this regard, it is not merely a gesture of tokenism or appeasement that an Aboriginal justice be appointed to the court. Rather, it is an innovative institutional response to the particular characteristics and traits ascribed to the Aboriginal experience in Canada.

[27] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 50.
[28] *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 62.

That experience reflects no credit on Canada, as it has consistently attracted the harshest societal indicators. Aboriginal people have consistently faced systemic institutional barriers to equality. Take for example the disproportionate incidences of systemic discrimination experienced by Aboriginal peoples in the criminal justice system, a facet of Canadian society that has not escaped commentary by the Supreme Court of Canada.[29] The appointment measures view Aboriginal peoples not merely as end-users of the justice system, but participants in the true sense of Canada's democratic compact. Accordingly, it is simply not enough to enjoy equality before the law in a legally pluralist society. Rather, the affected groups must play a role in the democratic compact by interpreting and applying their own laws. This participatory democracy must extend to Aboriginal peoples, particularly because of their constitutional status in Canada.

Significant to this analysis are the recommendations contained in Canada's Royal Commission on Aboriginal Peoples. The *Report of the Royal Commission of Aboriginal Peoples*[30] makes the following finding with respect to Aboriginal appointments to the Court:

> We believe that the Supreme Court of Canada should include at least one Aboriginal member. At any time, the federal government could appoint an Aboriginal person to fill a vacancy on the court. We believe that a requirement that one of the justices be Aboriginal should be the subject of a constitutional amendment. This would require provincial unanimity whether it involved designating one of the existing nine seats or expanding the size of the court.[31]

It should be noted, however, that the composition of the Supreme Court is presently a matter within the exclusive jurisdiction of the federal government under s. 101. Either of the two options proposed by the commission could be achieved by simple amendment of the *Supreme Court Act*. No constitutional amendment is necessary, as the structure of the

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[29] See for example *R. v. William*, (1998) 1 S.C.R. 1128. At paragraph 58 the Court observed, "There is evidence that this widespread racism has translated into system discrimination in the criminal justice system..."

[30] See Canada, *Report of the Royal Commission on Aboriginal Peoples, Volumes 1-6* (Ottawa: Supply and Services, 1996).

[31] *Ibid.* Vol. 6 at 129.

Court is not constitutionally enshrined. On this note, we wish to stress that there is no reason why the Supreme Court should have only nine judges, apart from convention and legislative choice. In light of the fact that the court has such great power, there are good reasons for suggesting that the number of judges should be expanded, so that the individual power of the judges is dispersed. In any case there is no reason why the composition of the Supreme Court should not be made to reflect the Aboriginal presence in Canada, either through expansion of the number of judges or by having the Aboriginal seat rotating through current allocations.

In their article, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a "Triple P" Judiciary" Professor Richard Devlin and his co-authors argue that principles of representation and diversity arise from the political consequences attributed to the decision-making powers of the Supreme Court. In advancing reform to the judicial appointments process, and in light of the legitimacy which representation is intended to ensure and protect, the authors argue that "a good case could be made for statutorily entrenched Aboriginal representation as a matter of cultural or regional identity, and as representatives of a different system of law."[32]

A fortiori, the legal consequences of the interpretation of s. 35 of the *Constitution Act, 1982*, coupled with the fact that Aboriginal rights are rooted ultimately in Aboriginal legal systems, make the case for Aboriginal representation that much stronger.

Reconciliation and the Composition of the Supreme Court

As the court held in *Secession Reference,* "In our constitutional tradition, legality and legitimacy are linked" and that Canada's constitutional history "demonstrates that our governing institutions have adapted and changed to reflect changing social and political values."[33] The importance of this passage must not be understated as legality and

[32] Richard Devlin, A. Wayne MacKay and Natasha Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a "Triple P" Judiciary" *38 Alberta L. Rev. 734 (2000)* at p. 843.
[33] *Québec Reference*, *supra* note at 240.

legitimacy form a central component to the institutional measures envisioned by s. 35 of the *Constitution Act, 1982.* In fact the Supreme Court of Canada in *R. v. Sparrow*[34] connected reconciliation with the project of legitimating the use of power over Aboriginal peoples as well:

> Section 35(1) does not explicitly authorize the courts to assess the legitimacy of any government legislation that restricts Aboriginal rights. The words "recognition and affirmation", however, incorporate the government's responsibility to act in a fiduciary capacity with respect to Aboriginal peoples and so import some restraint on the exercise of sovereign power. Federal legislative powers continue, including the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867, but must be read together with s. 35(1). Federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies Aboriginal rights (Emphasis Added).

The need for change and the need to safeguard the legitimate use of power are particularly pressing given the historical exclusion of Aboriginal peoples from participation in the administration of justice. The move forward is consistent with the creation and entrenchment of a national Canadian identity that is both progressive and inclusive. The absolute magnitude and effect the Supreme Court of Canada has on the lives of Aboriginal people points to the need for participation from Aboriginal people in the decision making processes of the Courts of Canada, and especially at the Supreme Court, where it matters most.

With respect to reconciliation, the Court in *Van der Peet* recognized that Aboriginal law is a distinct body of jurisprudence that existed prior to European contact and further, that its incorporation into the legal system of Canada requires special care and attention on the part of the Courts. Specifically, to give true meaning to Aboriginal rights the perspective of Aboriginal peoples on the right in question must be incorporated in a manner that recognizes and preserves the distinctiveness of Aboriginal societies. Lamer C.J.C. stated as follows:

[34] [1990] 1 S.C.R. 1075 at page 1077

> In assessing a claim for the existence of an Aboriginal right, a court must take into account the perspective of the Aboriginal people claiming the right. In *Sparrow, supra,* Dickson C.J. and La Forest J. held, at p. 1112, that it is "crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake". It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive Aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating Aboriginal rights claims must, therefore, be sensitive to the Aboriginal perspective, but they must also be aware that Aboriginal rights exist within the general legal system of Canada. To quote again Walters, at p. 413: "a morally and politically defensible conception of Aboriginal rights will incorporate both [Aboriginal and non-Aboriginal] legal perspectives". The definition of an Aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by Aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the Aboriginal perspective, yet do so in terms which are cognizable to the non-Aboriginal legal system.[35]

Canadian institutions, we suggest, must "take into account the Aboriginal perspective" not merely as a matter of judicial doctrine, but, we suggest, structurally as well. The way to ensure that the Aboriginal perspective is incorporated into a truly Canadian perspective is to ensure the participation of Aboriginal peoples in the governing institutions of Canada. Mere doctrine from the Court is insufficient, because as each generation interprets doctrine according to its own lights. Each generation seeks to do what it thinks is just, yet history is full of evils. Canadian history includes, to name a few events, the disproportionate incarceration of Aboriginal offenders, the era of residential schooling, and the removal of status membership for Aboriginal women prior to the enactment of Bill C-31. Such injustices would be far less likely to have occurred if there were true Aboriginal participation in the institutions of government.

(a) Section 35 (1) Reconciliation and the Constitution as a "Living Tree"

The process of reconciliation requires us to remember that the Constitution of Canada is a living tree, not bound by the conceptions of the past, but able to evolve into the future.

[35] *Van der Peet, supra* note at p. 550-51.

The "Living Tree" doctrine was first established in *Edwards v. Attorney-General for Canada*.[36] The issue in contention in that case was whether the Constitution allowed a woman to be appointed to the Senate. It could seriously be argued within the span of living memory that women were not so enabled, which is itself a sobering thought. A few observations can be made in this respect:

1. At least some of the principles the present generation thinks of as immutable may in a very short time be recognized as absurd; but
2. Not all the changes in principle will necessarily be changes for the better, and it is a fallacy daily impressed upon us in these perilous times to think that the march of progress is inevitable.
3. It is not unreasonable to suggest that any gains made in contemporary Canada to correct the wrongs of the past towards Aboriginal people should be incorporated into the structure of Canada so as to inhibit any return to majoritarian barbarism.

The living tree doctrine is a "continuing framework for the legitimate exercise of governmental power"[37] With respect to the *Charter*, in *Big M Drug Mart,* Dickson J. cautioned that the Court must not "overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts".[38] The precise historical context supporting the appointment of Aboriginal judges to the Supreme Court will be examined below.

The simple point here is that the appointment of an Aboriginal person to the Supreme Court of Canada is consistent with the purpose of reconciliation under s. 35(1) of the *Constitution Act, 1982*. Furthermore, such a measure would be consistent with the living tree doctrine given the ongoing process of reconciliation between Aboriginal peoples and Canadian society. The living tree of our constitution must manifest itself in new

[36] See *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, at p. 136.
[37] *Hunter v. Southam Inc., [1984] 2 S.C.R. 145, per* Dickson J. (as he then was), at p. 155.
[38] *Big M Drug Mart*, (FIX) *supra*, at p. 344. Note that in Big M., Dickson J. was speaking specific to the *Charter*.

institutional relationships standards which reflect the position of Aboriginal people within society. Aboriginal presence must be felt on all institutions of government in Canada, on administrative tribunals and all levels of court in Canada, and particularly on the Supreme Court of Canada, if the exercise of governmental power over them is to be legitimate.

(b) The Issue of Merit-Based Appointments and the Pool of Aboriginal Justices

In *Québec Reference*, the Court recognized the ability of our governing institutions to adapt and change to reflect social and political values with a preference towards methods that accomplish this by ensuring "continuity, stability and legal order."[39] As far as merit is concerned, it is important to note that under the present legislation, the section limiting who can be appointed to the Supreme Court is fairly open. Section 5 of the *Supreme Court Act* reads:

> Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

We do not suggest that merit is not a primary consideration for appointment to the Supreme Court. At the present time, however, there are many Aboriginal lawyers in Canada, and some with very distinguished careers. It cannot seriously be contended that from among the pool of available Aboriginal lawyers and judges, there are none suitable for appointment to the Supreme Court.

(c) Legality and Legitimacy: Aboriginal history and s. 35(1) of the Constitution Act

The significance of s. 35(1) carries with it an important historical dimension that pre-dates the *Constitution Act, 1867*. Moreover, it has a historical dimension premised upon the central role Aboriginal peoples performed in stabilizing English control over colonial North America, the precursor to what constitutes present day Canada. The English custom of treaty-making as the preferred method of joining up Aboriginal allies carried

[39] *Québec Reference, supra* at p. 240.

obvious benefits for local colonial governments and enterprises at a time when access to North America depended upon Aboriginal co-operation.

In this part of the paper we will examine the Supreme Court's recognition of this historical role that Aboriginal peoples played in the founding of Canada and how s-s. 35(1) enables the democratic compact to carry forward the obligations and understandings that permitted the establishment of a British government in Canada. Aboriginal participation in the Canadian polity is best ensured and developed through institutional modifications that allow Aboriginal peoples a say in their laws, both as Aboriginal people with unique constitutionally protected legal traditions, and as citizens of Canada.

In the *Secession Reference,*[40] the Supreme Court of Canada examined the country's four deepest constitutional values: democracy, federalism, constitutionalism and the rule of law, and respect for minorities.[41] Referring to Aboriginal peoples under the last category, respect for minorities, the court held that this value was "at least as old Canada itself" and further, the explicit protection for existing Aboriginal and treaty rights, however so "recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value."[42]

The origins of legal pluralism in Canada pre-date Confederation. Indeed, that pluralism is reflected in the Royal Proclamation of 1763, which was issued in the aftermath of the Seven Years War, shortly after the Treaty of Paris of 1763 was signed. The Proclamation was not entered into solely out of a spirit of generosity. As noted in *Chippewas of Sarnia Band v. Canada (Attorney General)*[43]:

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[40] *Reference Re Secession of Québec*, [1998] 2 S.C.R. 217 [hereinafter *Secession Reference*].
[41] *Québec Refernece, supra* at 24. The Court states: "In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. *See also* for an excellent discussion of Canada's capacity to invoke institutional capacity for pluralism, Cristie L. Ford, "In Search of the Qualitative Clear Majority: Democratic Experimentalism and the Québec Secession Reference", 39 Alberta L. Rev. 511.
[42] *Québec Reference supra* at 262.
[43] *1999 A.C.W.S.J. LEXIS 53036; 1999 A.C.W.S.J. 620428; 88 A.C.W.S. (3d) 728* (Lexis) [hereinafter *Chippewas of Sarnia*].

> The Royal Proclamation was an imperial instrument issued by King George III on October 7 1763, after the cession of New France to the British Crown. It performed two distinct operations. One operation was to introduce, into Quebec, English law and an elected legislature. Quite separate from these operations of civil government and judicial administration, the Proclamation made provisions to govern relations with the Indians. This part of the Proclamation was designed to secure the friendship and trust of France's former Indian allies and to counter the increasing dissatisfaction of the British Indian allies who thought that the conquering English entertained "a settled Design of extirpating the whole Indian Race, with a View to possess & enjoy their Lands. There was fear of an Indian war, particularly after Pontiac's war in the summer of 1763. The content and historical context of the Indian provisions demonstrate that they were directed to two distinct goals: to prevent Indian unrest and to provide a measure of equity and justice for the King's Indian subjects.[44]
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> The Royal Proclamation was publicly advanced by the Crown to the Indians as the basis of its Indian policy. This declaration of policy, at first unilateral, soon came to be relied upon the Indians and it became a mutually recognized and fundamental element of the treaty relationship. Sir William Johnson read out the Proclamation during the gargantuan 1764 council, preceding the Treaty of Niagara, that lasted almost two months and involved many hundreds of chiefs representing more than twenty two Indian Nations.[45]

So, the Crown began a process of affirming the rights and interests of particular groups of people, and setting forth their obligations in the Proclamation. The Royal Proclamation articulates the special relationship between the Crown and Aboriginal peoples and it is worth noting an important historical commonality—that is, the Proclamation is a centrepiece of both Canadian and American treatment of Aboriginal peoples. Following the Declaration of Independence of 1776 and the American Revolution when the U.S. Supreme Court continued the policy of the Proclamation in the form of exclusivity of federal jurisdiction over Aboriginal affairs in *Johnson v. M'Intosh,*[46] and as Marshall C.J. held in the *Worcester v. State of Georgia,* the use of British custom vis-à-vis Indian nationhood was the operating premise:

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[44] *Ibid.* at para 217.
[45] *Ibid.* at para 329.
[46] 21 U.S. (8 Wheat.), 1823.

> Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.[47]

It is this precise aspect of colonial relations that gives rise to the facets surrounding the *sui generis* status of Aboriginal peoples in Canada. Treaties became the formal legal instrument that recognized the early compacts, and as the Supreme Court of Canada observed in *R. v. Sioui*:

> The colonial powers recognized that the Indians had the capacity to sign treaties directly with the European nations occupying North American territory. The *sui generis* situation in which the Indians were placed had forced the European mother countries to acknowledge that they had sufficient autonomy for the valid creation of solemn agreements which were called "treaties", regardless of the strict meaning given to that word then and now by international law.[48]

"The American Revolution", it has been said "produced not one country but two: a nation and a non nation."[49] South of the border the American nation was born with panoply of national heroes and legends. In Canada, however, what existed was a compact between peoples who did not share in the American vision: Loyalist, French, and Aboriginal. This compact lasted well beyond 1783, as attested to by the historical fact of Tecumseh's alliance with the Crown in 1812. Unfortunately, in the 19th and 20th Centuries, this original compact was forgotten under the influence of the ideologies of the day—social Darwinism and the white man's burden, and the imperative of Aboriginal participation in Canada was largely forgotten. The effect of the ideologies of that time was reflected in many decisions and policies made by the legislative, executive and judicial branches of the Canadian government. Nevertheless, Canada has never embraced the melting pot approach so often associated with the U.S. experience. It has consciously chosen to model itself on the mosaic. As suggested earlier, the origins of the mosaic ideal go back

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[47] *31 U.S. (6 Pet.) 515 (1832),* at pp. 548-49.
[48] [1990] 1 S.C.R. 1025 at 1056 (hereinafter *Sioui*).
[49] David V. J. Bell, "The Loyalist Tradition in Canada" in J.M. Bumsted, ed. Canadian History before Confederation (2nd ed.) (Georgetown: Irwin-Dorsey, 1979) 209 at page 211 and page 225.

to the aftermath of the American Revolution.[50] Finally in 1982, the constitutional place of Aboriginal peoples in Canada was recognized. Aboriginal peoples had and continue to have a distinct role in shaping the Canadian national identity, and a seminal role in the founding of the Nation itself. So, in *Sioui*, the Supreme Court of Canada recognized that each of the three founding peoples sought alliances with one another as a means of securing mutual benefits between two governments.[51] Lamer C.J.C. for the court, observed the importance of acquiring Aboriginal alliances as between England and France when he stated:

> The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.[52]

The importance of the foregoing analysis is twofold. First, the inherent nature of Aboriginal rights speaks to the founding identity of this country and how vital it was for the Crown to respect the rights of Aboriginal nations. These rights are now entrenched in s. 35(1). Second, the dialogue is rooted in principles of legal pluralism based in part upon the historic interactions between three peoples at the critical moment when Canada came into being in the years after the American Revolution. Part of what happened at that moment led to the distinctive Canadian mosaic which contrasts so with the melting pot to the south. For our purposes it is essential to realize that the choice of the mosaic as the pattern for Canada was made because at that moment none of the three founding peoples could do without the others. This is of course in stark contrast to the situation to the south where in the aftermath of the Revolution, one people emerged dominant and with expansionist ambitions. The early relationship between Canada and America served to cement the bonds between the peoples who founded Canada. It is appropriate that, as this country grows in self understanding, its institutions come more and more to reflect the historic compact which gave it birth. And as we have noted, the position of the three

[50] *Ibid*. at page 226.
[51] *Sioui, supra* note 46.
[52] *Ibid.* at 1053.

founding peoples in this compact is constitutive and constitutional, giving rise not merely to cultural but legal pluralism, which ought to be reflected in all legal and governmental institutions in this country, including the Supreme Court of Canada.

Conclusion

The legitimacy of the institutions of Canadian government for Aboriginal peoples is ultimately dependent upon their participation in those institutions. If the Courts have said that "the honour of the Crown is at stake in dealings with aboriginal peoples"[53] that is because the Crown assumed power over them in a mysterious way, not by conquest but by settlement, in spite of early alliances on a nation to nation basis. The institutions of Canada, if they are truly to achieve legitimacy, must be open to and elicit the participation of aboriginal peoples. It is all the more important because for many years the government was not theirs.

The participation of aboriginal peoples in all levels of judicial decision making in this county is even more imperative, because the legal traditions of Aboriginal people have been incorporated into the Canadian Constitution by virtue of s. 35 of the *Constitution Act, 1982*. Legal decisions affecting Aboriginal peoples in the Courts and tribunals of Canada will never be fully legitimate until there is Aboriginal participation in those decisions. If as the Supreme Court of Canada has said, "it is… crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake",[54] then part of that sensitivity must be incorporated into the structure of decision making through Aboriginal participation in those decisions. The recognition and affirmation of aboriginal peoples' rights in Canada requires not merely words but concrete and structural efforts if the Crown is to achieve the reconciliation and legitimation of its power over them. This is particularly important at the Supreme Court of Canada, where final decisions on those rights are made.

[53] *Sparrow, supra,* note 33 at page 1114.
[54] *Sparrow, supra,* note 33 at page 1112.